Nos. 85-792, 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY SUPPORTING PETITIONERS

JAMES V. DOLAN
PAUL A. CONLEY, JR.
MARK B. GOODWIN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

CHARLES A. MILLER
GREGG H. LEVY*
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Railroad Company and
Missouri Pacific Railroad Company

June 1986

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-792, 85-793

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY SUPPORTING PETITIONERS

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company, intervenors in the court below, submit this brief in support of petitioners' request for reversal of the decision below of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT

Respondents Union Pacific and Missouri Pacific anticipate that the petitioners' briefs will accurately set forth the chronology of events leading to this proceeding. Accordingly, pursuant to Rule 34.2, respondents' statement will be limited to some additional elaboration necessary to put that chronology in context.

The proceedings below arise from disputes within several labor unions concerning which local's members would operate the trains of petitioner Missouri-Kansas-Texas Railroad Company ("Katy") in trackage rights service over the lines of respondent Missouri Pacific Railroad Company.[1] Respondent UTU, claiming rights purportedly based on the Railway Labor Act, complained to the ICC that its members employed by MP—rather than its members employed by the Katy—should operate Katy trains over MP's lines between Kansas City and Omaha. As the landlord carrier in these arrangements, MP was thus placed in the middle of a controversy over the selection of crews to operate its competitor's trains, a circumstance that was later aggravated by the unions' threat to strike MP over Katy's decision to operate its trains with Katy crews. See *generally Missouri Pacific Railroad Co.* v. *United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984) (enjoining threatened strike), *aff'd*, 782 F.2d 107 (8th Cir. 1986) (*per curiam*), *pet. for cert. pending*, No. 85-1054.

The ICC rejected the unions' challenges. The Commission confirmed that Katy's trackage rights application, which it had approved, reflected Katy's plans to use its own crews to operate its trains. Pet. App. 62a.[2] The Commission recognized that its approval "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA." See Pet. App. 67a. Accordingly, the ICC held that,

[1] Trackage rights allow one railroad to move its trains over another railroad's tracks. Such arrangements are common in the railroad industry, and often encouraged to avoid unnecessary duplication of track by railroads serving the same locations. Using the same set of tracks, the landlord and tenant carriers traditionally maintain separate—and often competing—operations with their own employees. Here, for example, the ICC imposed a condition to the UP/MP consolidation requiring UP/MP to grant the Katy the right to operate trains over MP's lines between Omaha and Kansas City. The ICC found that such trackage rights were needed to offset perceived competitive effects of the consolidation. See Union Pacific Railroad Company—Control—Missouri Pacific Railroad Company, 366 I.C.C. 459, 566 *et seq.* (1982), *aff'd in relevant part*, Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S. Ct. 1172 (1985).

[2] Record references are to the Appendix to the Interstate Commerce Commission's Petition For A Writ of Certiorari, filed in No. 85-792.

notwithstanding any contrary provisions of the Railway Labor Act, Katy was authorized to select the crews to operate its trains in trackage rights service. Pet. App. 67a-68a.

In an opinion by Judge Wright, joined by Judge Mikva, the D.C. Circuit Court of Appeals reversed and remanded on the asserted ground that the ICC "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a; footnote omitted.) Accordingly, judgment was entered for the unions over a vigorous dissent by Judge MacKinnon. In a subsequent decision of the Eighth Circuit Court of Appeals addressing the same dispute, that court declined to follow the D.C. Circuit Court's holding. See *Missouri Pacific, supra*, 782 F.2d at 110 *et seq.*

SUMMARY OF ARGUMENT

The immunity afforded by the Interstate Commerce Act must be self-executing, and must apply not only to consummation of the approved transaction, but also to its implementation. Specific findings of "necessity" are not required by the statute or by its legislative history. Judicial imposition of such a requirement would be inconsistent with the national transportation policy recently affirmed by Congress, and would put at risk the public interest benefits of transactions approved by the ICC.

ARGUMENT

THE IMMUNITY AFFORDED BY THE ICC'S APPROVAL OF RAIL RESTRUCTURING TRANSACTIONS IS "SELF-EXECUTING" AND NEED NOT BE JUSTIFIED BY SPECIFIC FINDINGS

We are confident that petitioners' briefs will demonstrate (1) that the Commission adequately explained the reasoning for its decision and (2) that the immunity afforded by the Interstate Commerce Act is, in fact, necessary for implementation of the approved Katy trackage rights transaction.

We submit, however, that this Court need not and should not reach those issues. The statutory scheme—and common sense—require that the immunity afforded by the Interstate Commerce Act be "self-executing," in the sense that specific findings of "necessity" by the ICC—to which no reference is made in the statute or in the legislative history—are neither required nor prudent. Once the ICC approves a rail restructuring under the Interstate Commerce Act, the statute should immediately afford immunity to all actions taken to implement the approved transaction.[3] For that reason, the Commission's decision below (though unnecessary) was correct, and the contrary holding of the D.C. Circuit Court should be reversed.[4]

The leading case on this issue is *Kent* v. *Civil Aeronautics Board,* 204 F.2d 263 (2d Cir. 1953), in which the Second Circuit held the Railway Labor Act inapplicable to mergers approved by the CAB under the terms of the Civil Aeronautics Act.[5] *Kent* did not require specific agency findings of "necessity" to justify the immunity; it simply recognized that the agency had given "due consideration" to the conflicting interests of both groups of employees, and "provided a method which fairly distributes the burdens and benefits." 204 F.2d at

[3] The relevant history of the Interstate Commerce Act and of its relationship with the Railway Labor Act is explained in Part II of the Brief Amicus Curiae of the Association of American Railroads, to which we invite the Court's attention.

[4] The court below would limit the immunity afforded by the Act to the formal consummation of the approved transaction; in its view, the immunity was intended only "to allow transactions to occur." Pet. App. 16a. That narrow perspective is inconsistent both with the transportation policies of the Act and with the objectives of the immunity power itself. If either set of objectives is to be accomplished, the immunity must be broad enough to embrace implementation of the approved transaction, as well as its formal consummation.

[5] The Civil Aeronautics Act was similar in all relevant respects to the Interstate Commerce Act, and it included an express exemption provision like that in the Interstate Commerce Act. *Compare* 49 U.S.C. § 11341(a) (1982) with 49 U.S.C. § 494 (1952). The *Kent* court nevertheless recognized that implied immunity was necessary for realization of the public interest benefits of the approved transaction, including the "stability in air transportation that freedom from industrial strife will provide." 204 F.2d at 265. In light of the ICC's comparable implied immunity powers, this Court need not rely on the express exemption provision of Section 11341 in reversing the Court below.

266. The ICC did precisely that here; in its decision approving the Katy's trackage rights, it provided traditional labor protections, including mandatory arbitration, for employees adversely affected by the approved transaction. See *Union Pacific—Control—Missouri Pacific, supra,* 366 I.C.C. at 654.[6]

Since *Kent,* almost without exception the federal courts have held that the Interstate Commerce Commission approval of a rail restructuring affords the participants immunity from any conflicting terms of the Railway Labor Act; in none of those cases was a specific finding of "necessity" required from the agency. For example, in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.,* 314 F.2d 424, 432 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), the Eighth Circuit Court held that the provisions of the Railway Labor Act were displaced even though "the Commission made no express finding or order" addressing the immunity issue.

In similar circumstances, the First Circuit Court recently reached the same result, recognizing that the exemption afforded by the Interstate Commerce Act is "self-executing." *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.,* 122 L.R.R.M. 2020 (1st Cir. April 9, 1986); *Nemitz* v. *Norfolk & Western Ry.,* 436 F.2d 841, 844-46 (6th Cir.), *aff'd on other grounds,* 404 U.S. 37 (1971). *Accord, Missouri Pacific Railroad, supra,* 782 F.2d at 111-12. All of these cases are consistent with this Court's decision in *Schwabacher* v. *United States,* 334 U.S. 182, 194 (1948), which held that the only

[6] The mandatory arbitration provisions are particularly important because they ensure that labor disputes arising out of approved rail transactions cannot block the public interest benefits of such transactions or otherwise interrupt the free flow of commerce. In this respect, they are fundamentally different from the Railway Labor Act protections, which in some circumstances allow the unions to strike. Other elements of the protective conditions include generous compensatory benefits ensuring that employees dismissed or displaced as a consequence of the approved transaction continue to receive their wages for as long as six years after the transaction. These conditions have been held to satisfy the requirement of 49 U.S.C. § 11347 that carriers involved in consolidation transactions provide fair arrangements to protect the interests of their employees. *E.g.,* RLEA v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

findings necessary to trigger the statutory immunity were those confirming that the approved transaction was in the public interest.[7]

The authorities cited above reach the only result consistent with common sense. The ICC could not reasonably be expected to anticipate every conceivable statutory obstacle to implementation of an approved rail restructuring. Nor could it reasonably be expected to articulate in advance the full panoply of "necessity" findings that would ensure realization of the public interest benefits of the approved transaction. Moreover, a requirement of specific, anticipatory findings would be vulnerable to exploitation by interested parties, who could refrain—as the unions did here—from bringing potential statutory conflicts to the Commission's attention during its review of the restructuring transaction.

We recognize, as did the court below, that there must be some means "to ensure that the ICC does not exceed its statutory powers." Pet. App. 17a. But, as confirmed by the unions' threat to strike over this dispute, forcing the Commission to speculate about every potential statutory conflict is not the answer to that concern. Instead, the Commission's compliance with the Act may be ensured by limiting the implied immunity power to consummation of the restructuring transaction (*e.g.*, the consolidation) and to its implementation.[8] Such

[7] City of Palestine v. United States, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), on which the majority below relies, is not to the contrary. That case involved a railroad's attempt to abrogate in a merger proceeding a contract in which one of the merging carriers had promised "to forever maintain in Palestine 4.5% of all of its employees in certain job classifications." 559 F.2d at 412. Because that contract was "not germane to the success of" the approved merger, the Fifth Circuit held that its abrogation was not immunized by the Interstate Commerce Act. *Id.* at 414. Unlike this dispute, which unquestionably involves labor impacts resulting from implementation of an approved transaction, *City of Palestine* did not address an effort by the merged carrier to implement the approved restructuring transaction.

[8] ICC orders in this proceeding confirm that any limitation on a tenant's rights to assign its own crews could, by reducing the tenant's control over service and variable costs, undermine the competitive effectiveness of the trackage rights. See, *e.g.*, F.D. 30000, Order of November 24, 1982, at 3; Order of January 18, 1983, at 3. Thus, crew selection is unquestionably related to the trackage rights transaction, and an inherent part of its

(footnote continues)

a limitation would offer the lower courts guidance when, as in this dispute, a question is raised in a collateral proceeding as to whether immunity has been afforded by a Commission decision. Such an approach would also take full advantage of the Commission's expertise, while limiting its discretion to those areas within the scope of its statutory mandate.

The alternatives to such an approach—delaying or putting at risk the public interest benefits of an approved transaction pending *post hoc* agency proceedings—are surely inconsistent with the national transportation policy recently affirmed by Congress. See *generally* 49 U.S.C. § 10101; S. Rep. 94-499, at 2-3, 1976 U.S. Code & Ad. News at 16 (complaining of administrative merger proceedings that previously had "drastically slowed change needed in the [rail] industry").

In this dispute, the good sense of the federal district court in St. Louis and the Eighth Circuit Court of Appeals prevented such a result; both courts recognized that denying Katy and MP immunity because of the absence of specific anticipatory findings "would be tantamount to saying that [a union] has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Missouri Pacific Railroad Co., supra,* 782 F.2d 111-12, *affirming Missouri Pacific Railroad Co., supra,* 580 F. Supp. at 1505. If this Court affirms the decision below, there is no assurance that such wisdom will prevail in the next dispute over implementation of a rail restructuring that the ICC has deemed in the public interest.

(footnote continued)

implementation. In contrast, for example, the issue addressed in *City of Palestine, supra,* which involved a railroad's long-term commitment to maintain a small part of its work force in one city, had no demonstrable transaction-related impact.

CONCLUSION

This Court should reverse and remand the court of appeals' decision, with instructions to affirm the underlying decisions of the Interstate Commerce Commission. This Court should confirm that the immunity afforded all rail restructuring transactions by the Interstate Commerce Act is "self-executing," that such immunity does not require specific findings of "necessity" by the ICC, and that such immunity applies not only to consummation of the transaction itself, but also to its implementation.

Respectfully submitted,

JAMES V. DOLAN
PAUL A. CONLEY, JR.
MARK B. GOODWIN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

CHARLES A. MILLER
GREGG H. LEVY*
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Railroad Company and
Missouri Pacific Railroad Company

June 1986

*Counsel of Record